No. 3973

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN TUPPELA, J. H. COBB as Trustee for John Tuppela, and GROVER C. WINN as Guardian of the person of John Tuppela,
Plaintiffs in Error,

vs.

ENOCH E. MATHESON,
Defendant in Error.

Brief for the Defendant in Error.

Upon Writ of Error from the District Court for Alaska, Division Number One.

R. E. ROBERTSON,
ENOCH E. MATHESON,
Counsel for Plaintiff and Defendant in Error.

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STATEMENT OF FACTS.

In this brief throughout the plaintiffs in error will be designated as the defendants, which was their status in the lower court, and the defendant in error will be designated as the plaintiff, which was his status in the lower court.

Complaint.

Originally the complaint stated three causes of action, but inasmuch as the plaintiff on the trial selected the second cause of action, as between the first and second causes of action, as the one upon which to go to trial (P. R. p. 44), nothing more, except perhaps inferentially, will be said about the first cause of action.

The second cause of action (P. R. pp. 10-17) is for damages suffered by plaintiff by reason of the defendant Tuppela's having breached a contract (P. R. p. 333) that was entered into on March 11, 1918, by said Tuppela and the plaintiff, and alleges inter alia that the plaintiff was a duly licensed and qualified attorney (P. R. p. 10); that the defendant Tupela on August 19, 1920, conveyed all of his right, title and interest in and to all of his property to the defendant Cobb in trust, subject only to certain reservation enumerated therein, and that said Cobb accepted said trust and ever since had been acting as trustee (P. R. p. 10); that the defendant Tuppela was pronounced insane on July 28, 1921, and that the defendant Winn was duly appointed as guardian and had ever since continued to act as said guardian, (P. R. pp. 10 & 11); the terms of said contract (P. R. pp. 11, 12 & 13); that plaintiff faithfully and diligently performed the covenants of said agreement to be borne by him and performed legal services that extended over a period of five months (P. R. p. 13); that the defendant Tuppela breached

said contract without justification and prevented its performance by plaintiff (P. R. pp. 14 & 15); that the defendant Tuppela's claims were successfully prosecuted by other counsel whom he employed in violation of his agreement with plaintiff, and that as a result thereof the said defendant Tuppela recovered certain interests in certain mining claims and also the sum of $300,000.00 cash (P. R. pp. 15 & 16); that these claims were the same as the claims mentioned in the agreement between the plaintiff and Tuppela (P. R. p. 16); that the services rendered to Tuppela by the plaintiff were of great value, and that the contract of March 11, 1918, was of great value to the plaintiff, and that by reason of Tuppela's breaching said contract the plaintiff was damaged (P. R. pp. 16 & 17).

The third cause of action in substance is that the plaintiff at the special instance and request of the defendant Tuppela advanced and loaned to him, between March 11, 1918, and August 30, 1918, the sum of $362.50, no part of which has been repaid (P. R. pp. 17, 18 & 19). At this time we call attention to the fact that no appeal has been taken, nor any error assigned other than possibly the first assignment (P. R. p. 362), to the judgment in favor of the plaintiff on the third cause of action.

SECOND AMENDED ANSWER.

The defendants went to trial upon the second amended answer which contained six af-

firmative defenses. The first in substance set forth that the plaintiff is not admitted to practice in the courts of Alaska, and that suit was contemplated in the agreement between plaintiff and Tuppela to be brought in the name of Tuppela against the Chichagoff Mining Company and that such suit was to be brought in the District Court of Alaska (P. R. pp. 26 & 27).

The second affirmative defense set forth in the alternative that, if defendant Tuppela had discharged plaintiff as his attorney, that said discharge was justified by the plaintiff's alleged gross negligence relative to not instituting suit (P. R. p. 27). This defense contained no allegations that the defendant Tuppela had in any wise been damaged by any alleged negligence of the plaintiff.

The third affirmative defense sets forth that plaintiff obtained the contract into which he and the defendant Tuppela entered, by practicing fraud and imposition upon the defendant Tuppela (P. R. pp. 27, 28 & 29).

The fourth affirmative defense sets forth an alleged estoppel of the plaintiff to claim anything under said contract by reason of certain alleged misconduct by which Tuppela was induced to employ and pay other counsel to prosecute said suit (P. R. pp. 29, 30 & 31).

The fifth affirmative defense sets forth that the defendant Tuppela justifiably discharged plaintiff by reason of certain alleged

gross negligence of the latter relative to failure to bring any suit or otherwise prosecute Tuppela's claims (P. R. pp. 31 & 22). This defense does not, as we read it, set forth that Tuppela suffered any damage by reason of any alleged negligence of the plaintiff.

The sixth affirmative defense goes only to the third cause of action and is in an alternative form to the effect that if the plaintiff advanced or loaned the moneys claimed they were only to be repaid upon the successful termination of a suit to be brought and instituted by the plaintiff, and that plaintiff did not bring or prosecute such suit, and that the advancement of said moneys was of no benefit to said Tuppela (P. R. p. 32).

REPLY.

The plaintiff replied to the first affirmative defense and denied all of it except he admitted that it was in his and Tuppela's contemplation to prosecute to final determination said Tuppela's claims by such action, **legal or otherwise,** as might be neecssary, and that plaintiff had never been admitted to practice in the courts of Alaska (P. R. p. 37).

Plaintiff replied to the third affirmative answer and denied each any every part thereof, ecept he admitted that Tuppela became insane in 1913 and was sent to Morningside Asylum for treatment and that he was discharged therefrom on or about December 17,

1917, and that plaintiff is and has held himself out as an attorney at law for many years, and Tuppela, after his disharge from the asylum was desirous of finding an attorney to bring suit on his behalf to recover certain mining claims and other property from the Chichagoff Mining Company, and that on or about March 11, 1918, plaintiff and defendant Tuppela entered into the contract that was placed in evidence in the trial of the case (P. R. p. 38).

Plaintiff in his reply denied in toto the allegations of the second, fourth, fifth and further (i. e., sixth) affirmative defenses (P. R. pp. 37, 38 & 39).

VERDICT AND JUDGMENT.

The case was tried before a jury which on November 13, 1922, returned a verdict in favor of the plaintiff on the second cause of action for $2,500.00 and, on the third cause of action, for $362.50 (P. R. p. 41), on which verdict judgment was entered on November 18, 1922 (P. R. pp. 40, 41 & 42).

ARGUMENT.

In discussing the law applicable to this case we shall follow the order of the argument set forth by the deefndants in their brief on page 12, although we may in some cases restate the propositions in a different form than the set forth by defendants on said page of their brief.

First.

The first proposition submitted by the defendants is in the exact language as used by them, to be found in their motion for an instructed verdict upon the second cause of action, made at the close of the case which reads as follows: "There is nothing in the pleadings or the evidence to sustain a verdict against the defendant J. H. Cobb, as trustee for John Teppela." (Brief for Plaintiffs in Error, p. 7; P. R. pp. 284 & 285).

Although not desiring to quibble, we submit that the proposition so actually brought to the attention of the trial court is somewhat different than the proposition that is now urged that "neither the pleadings nor the evidence tended to show any liability to the plaintiff on the part of the defendant J. H. Cobb, as trustee for John Tuppela." (Brief for Plaintiffs in Error, p. 12).

A clear distinction, we think, if necessary could be readily made between these two propositions. Although the defendants amended their answer twice in the case and went to trial upon their second amended answer (P. R. p. 22), there is no record of their ever having raised any objection to either a nonjoinder or misjoinder of parties defendant unless at the close of the trial their motion for a directed verdict should be construed to raise that point. (P. R. p. 284).

The authorities are unanimous that it is too late to make such objection at the trial. This court has so held in a case arising in the same jurisdiction and under the same laws as were in effect at the trial of this action.

> "An objection for nonjoinder or misjoinder of parties is too late when made for the first time at the trial of the case."
>
> Mackie v. Fox, 121 Fed. 487.

There are numerous other decisions which are in consonance with the opinion of this court, but we simply make reference to them without quoting therefrom:

Osborn v. Logas, 42 Pac. (Ore.) 997;

Cohn v. Ottenheimer, 10 Pac. (Ore.) 20, 22;

Wolf v. Eppenstein, 140 Pac. (Ore.) 751, 754;

In re Youngs Estate, 126 Pac. (Ore.) 992, 993;

Bohn v. Wilson, 101 Pac. (Ore.) 202, 204.

The defendants speculated on the chances that if the defendant Cobb were left a party defendant and a verdict should result adversely to the plaintiff, they or he could plead res judicata to any suit subsequently brought against him as trustee by plaintiff. The turn of the wheel having gone against them in that speculation, defendants are in poor grace to assert that the judgment should be reversed on that ground and the plaintiff required to retry

the suit as against the defendants Tuppela and Winn.

Momentarily assuming for the sake of the argument that no judgment should have been returned against the defendant Cobb, still such concession would not warrant the reversal of the judgment. Section 1067, Comp. Laws of Alaska, 1913, provieds:

> "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves."

Under this statute, if in fact Cobb is not liable, but the other two defendants are, judgment could be rendered against Tuppela and Winn regardless of whether or not judgment were rendered against Cobb. The Oregon Supreme Court in considering the Oregon statute, from which the Alaska statute was undoubtedly adopted said:

> "If A. were to sue B., C. and D. upon a joint oblication upon which they were all liable, and were all served with summons, he could not recover against any of them severally. He must recover against all or none; but, if it should appear that either of them was not a joint obligor, he could recover against those who were, the same as

> though he had sued them alone. It is not shown in the complaint that Peter Donohue was ever liable upon the contract in suit, and consequently he or his representatives could be dropped out of the case any time, and it would not affect the others. They could be recovered against the same as if they had been sued alone."
>
> Fisk v. Henarie, 13 Pac. (Ore.) 193, 194.

In a later case the Supreme Court of Oregon ordered judgment entered against certain parties who had been erroneously dropped from the proceedings.

> N. P. Lumber Co., v. Spore, 75 Pac. (Ore.) 890, 896.

Under a similar statute the Idaho Supreme Court has held to the same effect:

> "Under this section the action does not abate upon the failure of the plaintiff to make out a case of joint liablility but the defendants against whom liability is not shown should be dismsised from the action, and judgment rendered against the defendants shown to be liable."
>
> Parrott v. Twin Falls Etc. Co., 188 Pac. (Idaho) 451, 452.

We also refer to:

> Sabin v. Mitchell, 39 Pac. (Ore.) 635, 636;
> Ah Lep v. Gong Chov, 9 Pac. (Ore.) 483, 487.

It would appear that J. H. Cobb was a proper party to said action. The agreement entered into between Cobb and Tuppela not only conveyed all of Tuppela's property to Cobb in trust, but provided further that, in the event J. H. Cobb should not survive Tuppela, E. L. Cobb, the son of J. H. Cobb, should be the latter's successor (P. R. pp. 351 to 355). The third provision of that agreement specificially provided that said Cobb should hold said property in trust for the following uses and purposes, to-wit:

> "To pay out of the proceeds of said property, and moneys received by him, all debts due and owing or to become due and owing by me, including the compensation that may become due to him for services as my attorney in the case of John Tuppela versus Chichagoff Mining Company under the contract now existing between us for such services." (P. R. p. 352).

It will scarcely be urged that the defendant Cobb neither has nor claims an interest in the controversy adverse to the plaintiff. If such contention be made, it is strange that a disclaimer was not filed in the action. Having such an interest in the controversy, the plaintiff had a right to make him a party defendant under Sec. 870, Comp. Laws of Alaska, 1913, which provides that:

> "* * * Any person may be made a defendant who has or claims an interest in the

> controversy adverse to the plaintiff, or who is a necessary party to the complete determination or settlement of the question involved therein."

Was it not requisite for the plaintiff to make the defendant Cobb a party because of the fact that as trustee of Tuppela's property he was united in interest with Tuppela in defeating the plaintiff's claim? Section 871, Comp. Laws of Alaska, 1913, provides that:

> "Of the parties to the action who are united in interest must be joined as plaintiffs or defendants; * * * "

Defendant's contention that Cobb was not a proper party or that judgment should not be rendered against him must, if logical, be based upon the theory that some right of his as trustee has been infringed upon which would have been protected if such procedure had not been followed. Such a contention appears not logical but, on the contrary, absurd when the fact is considered that the trustee agreement between Cobb and Tuppela specifically directs Cobb to pay all debts due and owing or to become due and owing by Tuppela. The duty is thereby imposed upon Cobb to pay the judgment obtained by plaintiff against Tuppela, but defendants in effect say that they have been deprived of some right because the plaintiff has not put them, or at least Cobb as trustee, to the additional expense of defending a suit to compel him as trustee to pay the judgment obtained by plaint-

iff against Tuppela. Apparently the defendants would prefer the expense of two suits rather than to economize by having the matter entirely tried out in one suit.

Their objection does not go to the merits of he case, but relates more nearly simply to a desire to be obliged to defend two suits instead of one. Their position is very similar to that taken by the defendant in the case of Benson v. Keller, 60 Pac. (Ore.) 918, 920 & 921, in which the Supreme Court of Oregon said that "To put the plaintiff out of court could not better subserve the ends of justice than to determine the whole controversy now."

Second.

The second proposition advanced by the defendants is that "the plaintiff not being a member of the bar of Alaska had no capacity to perform the services stipulated in the contract and could not recover either on the contract or in quantum meruit." (Brief of Plaintiffs in Error, p. 12).

This proposition is urged upon the theory that plaintifl has never been admitted to practice in the courts of Alaska (P. R. p. 116), and that he was not admitted to practice in the courts of Oregon until July 9, 1915, (P. R. p. 331, and that he could not under the law have been admitted to practice in Alaska for some two years after the making of the contract be-

tween him and Tuppela on March 11, 1918 (Brief of Plaintiffs in Error, p. 13).

We are unable to subscribe to the contention that plaintiff could not have been admitted to practice in the courts of Alaska. Chapter 75, Alaska Session Laws, 1915, prescribes perhaps rather rigorous requirements before one may become a member of the bar of Alaska, but its provisions are not as severe as claimed by the defendants. The plaintiff is a graduate of the law school of the University of Oregon (P. R. p. 45), and was admitted to practice by the Supreme Court of Oregon on July 9, 1915 (P. R. p 331) and in the United States District Court for the District of Oregon on November 22, 1915 (P. R. p. 332), and in the United States District Court for the District of Washington (P. R. p. 46), and he also practiced in the Supreme Court for the State of Washington (P. R. p. 49), and bears a good reputation as to ability and standing in the legal profession (See P. R. pp. 217 & 218).

Under these facts the District Court for the District of Alaska would not have hesitated to have admitted the plaintiff to practice under Section 3, Chapter 75, Alaska Session Laws, 1915, which reads a sfollows:

> "That in any case where the applicant has taken a full course of legal study in any accredited school of law, as prescribed by said school, to be evidenced by certificate from such school, where the course of study

> therein in not less than two years and is equivalent to that provided for by this act," (See Sec. 2 idem) "the Court may order the examination for admission to practice of the applicant without requiring the applicant to prepare therefor as herein provided, and provided such course of study has been within three years preceding his application for admission."
> The burden of proving that plaintiff was

not qualified to be admitted as attorney before the courts of Alaska would, we assume without argument, fall upon the plaintiffs in error, but they entirely neglected to sustain that burden. Assuming, however, for the sake of the argument, that the plaintiff was and could not have been admitted to practice in the courts of Alaska, it is not a foregone conclusion that a suit that would have secured to Tuppela all the remedies to which he was entitled could not have been brought by him against the Chichagoff Mining Company in another jurisdiction than Alaska. The suit actually instituted and which was presented to this court (See 267 Fed. 753), was at least in part, in the nature of a suit for an accounting. The trial court by its intruction (P. R. p. 307) specifically held that the suit could only be brought in the Territory of Alaska. We have no wish to argue the point, but a serious question might be raised as to the correctness of such holding, and particularly so far as that suit was for an accounting, in

view of the doctrines announced by the Supreme Court of the United States in Fall v. Eastin, 215 U. S. 1, 54 Law Ed. 65, 23 L. R. A. (N. S.) 924.

However, be that as it may, the fact remains that there was a specific provision in the agreement between the plaintiff and Tuppela th at the former might associate any other attorney or attorneys with him as associate counsel in all matters therein (P. R. p. 335). Moreover, plaintiff testified positively that he informed Tuppela with reference to his nonadmission to practice in the courts of Alaska, and that he drew the contract with intent to show therein that he had the right to associate other counsel with him. (P. R. pp. 66 to 69.)

We submit that plaintiff's testimony on this point is convincingly truthful even though the defendants charge that plaintiff inveigled Tuppela into making a contract which was impossible for plaintiff to perform. (Brief of Plaintiffs in Error, p. 15). It may not be amiss at this time to point out that regardless of the misfortunes of age and illiteracy under which Tuppela may have been suffering, the defendants themselves held other beliefs in that connection not so very long before the trial of this particular action was had.

Te defendant Cobb testified, after his attention was called to testimony that he had given in the proceedings in the probate court in

which the defendant Winn was appointed guardian of Tuppela's person (P. R. p. 259), that so far as he knew and believed Tuppela was perfectly rational up to June 26 or 27, 1921, and that he had seemed so to be all the previous time he, Cobb, had known Tuppela prior to that time, and that Tuppela did not seem to be insane at all and that he stood cross-examination well in the Chichagoff Mining case and that his testimony was clear, and that he testified in English without an interpreter (P. R. pp. 260, 261 & 262); also that this old illiterate prospector signed the pleadings (Plaintiff's Exhibit No. 14, P. R. p. 337) without any interpreter, and that he, Tuppela, could understand English if it was spoken clearly to him. (P. R. p. 273). Tuppela himself apparently did not consider that he was entirely ignorant, as on December 29, 1920, he swore before the defendant Cobb that "It is true that in May, 1919, about the time of my return to Juneau, Henry Lepisto, without any suggestion from me, but as I understood it, at the request of Judge Winn, attempted to interprete for me in stating my case to Mr. Cobb, but he was utterly unable to do so because of his ignorance of the English language. Such interpretation was thought necessary at the time, not because I could not express myself in English but because of an impediment in my speech due to the loss of my front teeth and my inability to enunciate dinstinctly." (P. R. pp. 193 &194.)

The witness J. J. Barrett on cross-examination stated that Tuppela could speak the English language fairly well (P. R. p. 219).

The witness Moilanen testified that he explained the contract between plaintiff and Tuppela, to Tuppela, in the Finnish language (P. R. pp. 202 & 203).

The plaintiff himself testified that at the time of the execution of this contract it was read to Tuppela in both the Finnish and English languages and that Moilanen acted as enterpreter (P. R. p. 66).

While untoubtedly it is a well established rule that the confidence reposed in counsel is personal and cannot be delegated to another without the client's consent, yet we do not understand that this rule is any different from any other rule in that there can be no exceptions to it. Th eevidence clearly shows that the contract itself provided, and that both the plaintiff and Tuppela understood, that the former would, or at least had the rigth to, employ associate counsel. Even if this were not true, in the case of a contract made in the State of Oregon, assuming that the services thereunder necessarily were to be performed in the Territory of Alaska, we submit that the distance between the two localities is such that it would be fairly inferred, without any specific authorization, that plaintiff had the power to delegate his authority to an attorney in the Territory

of Alaska, and not only to employ an associate but even a substitute attorney, so long as it was at his expense.

> "But the general rule as to delegation of an attorney's authority yields where the facts of a particular case are such that it may fairly be inferred that power to delegate his authority was given, and a distinction is to be observed between the authority of an attorney to employ a subordinate and his power to employ a substitute. While an attorney ordinarily has no implied authority by virtue of his employment to employ assistant or associate counsel at his client's expense, and this is held to be true especially where the client does not know that the attorney was employed, or where it can not be said that he ought to know this fact, yet he may empower another attorney to appear for him, which appearance will bind his client, and where employed to conduct a case in another county he may employ local counsel to attend to formal matters connected with the court and charge the fees of such counsel as expenses if not in excess of what they would have been had the attorney of record attended to such matters in person."
>
> 2 R. C. L. pp. 978 & 979.

Moreover, an attorney admitted to practice in the State of Oregon is not precluded from recovering damages for breach of a contract

covering services that might have been, or even that necessarily must have been, performed in the Territory of Alaska if the attorney had been permitted to carry out the contract, where such attorney informed his client that he was not admitted to practice in Alaska and that for any court proceedings in Alaska he would associate himself with another attorney.

There is nothing in this case on this score to prevent the plaintiff from recovering any more than there was to prevent the plaintiff from recovering under very similar facts arising in the State of Massachusetts and reported in Brooks v. Volunteer Harbor, No. 4, 123 N. E. (Mass.) 511.

See also: National Bank v. Old Town Bank, 112, Fed. 726.

To hold that the contract in question is void because the plaintiff was not admitted to practice law in the courts of Alaska, would be tantamount, we submit, to holding that no member of the bar in the city of San Francisco could contract with any client in that city relative to affairs that the client might have in the Territory of Alaska, because the settlement of such affairs might require a law suit in that territory and therefore he, the attorney, regardless of what services he might perform, could not obtain any compensation therefor because of his not being a member of the bar of Alaska. No attorney would dare risk giving advice to

ny client relative to any matter unless the matter were confined solely to the jurisdiction in which the attorney was admitted to practice.

Third.

The third proposition advanced by the Plaintiffs in Error is that the proof failed to show that Tuppela discharged the plaintiff. (Brief of Plaintiffs in Error, p. 12.)

There are many circumstances which, we submit, conclusively show that Tuppela did discharge the plaintiff unjustifiably. The evidence is clear that it was agreed between Tuppela and the plaintiff that Tuppela should go to Alaska and locate his witnesses and to send their names and addresses, as well as certain papers that he had left in Sitka, to the plaintiff so that the latter would be in position to present his claims to the Chichagoff Mining Company. (P. R. pp. 75, 76, 77, 83 &84). These witnesses were later witnesses in the case of Tuppela against the Chichagoff Mining Company (P. R. pp. 250, 268 &269); that after the plaintiff returned to his office in the fall of 1918 from a spell of sickness, he made inquiry of Mr. Nikula as to Tuppela, and, having received no letters from Tuppela, worte him a letter in the Finnish language (P. R. p. 86) for the reason that that was the easiest language for Tuppela to read (P. R. p. 87), wihch said letter never returned (P. R. p. 87), in which he made inquiry as to whether Tuppela had located his witnesses and found

the papers that he was endeavoring to locate (P. R. p. 88); that the plaintiff wrote Tuppela again about March 1, 1919, and asked him whether or not it was true he had retained an attorney (P. R. p. 94), propounding that question to Tuppela because he had heard from a fisherman that Tuppela had retained another attorney (P. R. p. 96), and that in the summer of 1919 he received a letter from the defendant Cobb (Plaintiff's Exhibit No. 5, P. R. p. 97) stating that Tuppela had told him, Cobb, that he had left a lot of papers in March last with the plaintiff which were now needed and to send them either to Cobb or Tuppela; that this letter contained no information as to what business the defendant Cobb was in, and that thereupon the plaintiff again wrote to Tuppela and told him about receiving a letter from Cobb and told him, Tuppela, that he had never sent to the plaintiff the papers for which he went to Alaska, which letter was addressed to Juneau, Alaska (P. R. pp. 98 & 99).

It is significant that the defendant Cobb in writing to the plaintiff his letter of July 17, 1919, (Plaintiff's Exhibit No. 5) in no wise mentioned the contract between Tuppela and the plaintiff, nor made any inquiry as to the plaintiff's professional relationship to Tuppela although it is apparent from his testimony that Tuppela must have, to some extent at least, informed Cobb of his, Tuppela's, relationship to the plaintiff, inasmuch as Tuppela told Cobb

that he had turned all his papers over to plaintiff (P. R. p. 265), and furthermore, sometime during the transaction Cobb had a copy of this contract in his possession (P. R. p. 267), and knew that the plaintiff was an attorney and that he had been Tuppela's attorney and that he had had a contract with Tuppela (P. R. p. 266). We submit that no duty rested upon the plaintiff as a attorney to pursue Tuppela as a client and to haul the latter back into his office, and that he acted strictly according to professional ethics in his endeavors to ascertain what had become of his client, and that if any rules of professional ethics were violated, the breach was committed by the defendant Cobb who, knowing of the relationship between Tuppela and the plaintiff, failed to consult the plaintiff as to whether or not that relationship still existed. There is no evidence that Tuppela ever corresponded with plaintiff other than by the letter of the defendant Cobb on July 15, 1919, (Plaintiff's Exhibit No. 5) although Tuppela says himself that he made arrangements with J. R. Winn to represent him about the early part of January, 1919, (P. R. p. 193), which statement is further corroborated by the affidavit that he made on September 12, 1919, before the defendant Cobb, in which he stated "As soon as I reached Sitka I made inquiries and learned that the Chichagoff Mining Company was then claiming adversly to me through the deed of W. P. Mills * * * I refused to sign the paper or accept the money or any part of

it and as soon thereafter as I could, I consulted counsel and brought suit." (P. R. p. 360).

Neither is there any evidence that Tuppela ever consulted plaintiff as to employing either J. R. Winn or J. H. Cobb as associate counsel in the case, nor did either of them ever consult the plaintiff about their being employed in the case.

The case of Brown v. Green, 62 So., 154, as we understand it, simply holds, not that the circumstances therein set forth did not justify the attorney's abandonment of the client's case, but that it did not jusitfy him in doing so without giving notice to the client.

In the case of Welsh v. Shumway, 65 Illinois 473, there was a delay on the attorney's part of approximately 3½ years and the proof required was of the simplest nature, and, moreover, the attorney was not prevented from acting by any act of the client. That case, we submit, in no wise supports the contention that Tuppela did not discharge the plaintiff. No contention will be made that the case of Tuppela v. the Chichagoff Mining Company was a simple case. The evidence of the defendant Cobb plainly indicates the contrary. (P. R. pp. 255 & 256).

While the mere fact of employment by the client of associate counsel may not be sufficient ground to justify an attorney in abandoning a case, yet we understand that it somewhat de-

pends upon the manner in which this is done. Tuppela's employment of additional counsel in Alaska, without consulting with or notifying plaintiff thereof, under a contract almost identical with the contract that Tuppela had theretofore made with the plaintiff (Plaintiff's Exhibits Nos. 3 — 15, P. R. pp. 333 & 349) and under which subsequent contract Tuppela agreed with the new attorneys that they should have one-half of the amount in money or property recovered, clearly indicates that Tuppela not only did but that he intended to, discharge plaintiff, and these facts go far beyond the scope of the language of the Illinois court when it said:

> "Something depends on the manner in which such a thing is done, but in general it is a great advantage to have as associate, no matter how distinguished the attorney first retained may be, another no less distinguished."
>
> Morgan v. Roberts, 38 Ill. 65.

The rule stated by the New York court in the case cited by the defendants in their brief is:

> "While a client has the undoubted right to employ any counsel he chooses, yet it is fair and proper, and professional etiquette requires, that he should consult the attorney and other counsel in the case so that they can withdraw, if for any reason they

do not desire to be associated with him."

Tenney v. Berger, 93 N. Y. 524, 45 Am. Rep. 263.

Tuppela thus not only unprofessionally discharged the plaintiff but justified plaintiff, if he saw fit, in withdrawing as the attorney for Tuppela. Tuppela having previously made a contract (Plaintiff's Exhibit No. 3) with plaintiff by which plaintiff's compensation was to be one-half of the amount recovered, it is impossible to believe that, when he made the subsequent contract with Winn and Cobb (Plaintiff's Exhibit No. 15), which provided that their compensation should be one-half of the amount recovered, he could have had any other idea than to discharge the plaintiff, as otherwise he had made contracts by which the full amount of the recovery was to be paid out as compensation. Moreover, Tuppela did all these things without any communication with the plaintiff. Defendants attempt to justify this on the ground that Tuppela was an old illiterate prospector but it is significant that although he told his new attorney, the defendant Cobb, about his contract with plaintiff and about the papers that he claimed to have left with plaintiff (P. R. p. 251), yet the defendant Cobb in writing to plaintiff (Plaintiff's Exhibit No. 5), entirely failed to make any statement about his employment as Tuppela's attorney, or inquiry about plaintiff's relationship with Tuppela. We submit that these facts are amply sufficient to

have justified the jury in finding that Tuppela discharged the plaintiff and that the breaking off of all communication alone would have been sufficient evidence on that score.

See Dempsey v. Dorrance, 132 S. W. 133.

Fourth.

The fourth proposition advanced by defendandts and which they state is based on their first and fifth assignments of error, is that "the proof showed conclusively that plaintiff had been guilty of such negligence as fully justified Tuppela in discharging him as his attorney in any event." (Br. of Plaintiffs in Error, p. 12).

Under the third proposition, supra, we have discussed Tuppela's discharge of the plaintiff; hence, we shall endeavoq to indulge in as little as possible useless repetition.

The evidence seems to us to clearly establish that the plaintiff was not only ready and willing but that he held himself in readiness to perform the ocntract with Tuppela and that he was prevented from carrying out the contract by the acts of Tuppela (P. R. pp. 70 to 112, p. 137, pp. 215, 216). So far as we recall, there is no evidence that Tuppela was ill in December, 1918, other than that of the plaintiff who testified: "But I had heard that he was sick with the flu in Tacoma. I traced that up and found out he wasn't there," (P. R. p. 129) but there is evidence that plaintiff himself was ill with the

flu in the fall of 1918 and got back to his office in the latter part of November (P. R. p. 86).

The plaintiff testified in regard to his practice of instituting lawsuits: "I wait for the proper time. When I have both the facts and the law in the case, then is when I take my steps," (P. R. p. 137). We submit that such is the practice of any conscientious lawyer and that there is nothing in the testimony of the witnesses Wickersham, Rustgard or Roden to the contrary. The witness Wickersham testified: "Every case stands upon the facts in that case; yes," in answer to the question: "Now, there may be circumstances where even a great deal more than thirty days could elapse and you wouldn't feel that the attorney had committed negligence, would you?" (P. R. p. 229). The witness Rustgard testified that a suit to recover mining claims in possession of a third party who may be developing them, should be brought "As soon as practically possible." (P. R. p. 230). The witness Roden testified that he wouldn't bring the suit until he got the facts together upon which to substantiate the case. (P. R. p. 238). Moreover, defendants cannot in good faith insist that the plaintiff committed negligence in not having instituted a suit within ninety days without conceding that negligence was committed in the actual bringing of the suit against the Chichagoff Mining Company as the evidence conclusively shows that more than ninety days elapsed after at least one of the

counsel were retained before that suit was actually brought. Plaintiff testified that: "I afterwards found out that he" (Tuppela) "had retained Winn in December, 1918." (P. R. p. 129). Tuppela himself on December 29, 1920, swore before the defendant Cobb that he, Tuppela, had retained J. R. Winn as his counsel about the early part of January, 1919 (P. R. p. 193). This same affidavit also clearly shows that this is the same J. R. Winn with whom the defendant Cobb was later associated as Tuppela's counsel. (P. R. p. 193). Tuppela's affidavit of September 12, 1919, sworn to before the defendant Cobb, might even lead one to believe that the date was earlier than the early part of January ,1919, (P. R. p. 360). The suit of Tuppela against the Chichagoff Mining Company was not instituted until May 10, 1919 (P. R. p. 223), and Tuppela requested leave afterwards to file an amended complaint which was filed on June 16, 1919 (P. R. p. 279). We do not mention these facts for the purpose of criticising Judge Winn as to the time taken in which to file the complaint, but simply to show that the period of time within which to bring a suit, that the defendants seek to urge against the plaintiff under the testimony of witnesses Wickersham, Rustgard and Roden, was overrun as a matter of fact by the Alaskan counsel who actually brought Tuppela's suit against the Chichagoff Mining Company.

The learned trial court specifically instruct-

ed the jury that there was no evidence of a formal discharge and left the determination thereof to be determined by the jury under the circumstances of the case. (P. R. p. 328). The circumstances which we have heretofore discussed under the third proposition, supra (See P. R. pp. 86—88, 97—99, 193, 253, 265, 266 & 360) were clearly such as to show a discharge, and that the learned trial court under the evidence of Tuppela's having entered into a practically similar contract with Messrs. Winn and Cobb (P. R. p. 30; p. 349) would have been warranted in instructing the jury that Tuppela did discharge the plaintiff, and that as a matter of fact there was evidence of a formal discharge.

The trial court also left to the jury the determination of whether or not the discharge if any, was justifiable. (P. R. p. 329).

Moreover, the instruction complained of by defendants (P. R. pp. 365 and 366; Bf. of Plaintiffs in Error, p. 12), was immediately followed by the instruction: "That the burden of proof is on the plaintiff to show the discharge, and first, that the same was wrongful and without sufficient cause." (P. R. pp. 330 & 331). The learned trial court had previously so instructed the jury, and also told the jury: "In desiding this question, you will consider that it is implied in every contract of the employment of an attorney that he will exercise ordinary skill, care, prudence and dispacth in attending to his

client's business; that is to say, the degree of skill, care, prudence and dispatch which a reputable lawyer exercise under the same or similar conditions. If he fails in this regard, I charge you that the client is justified in discharging him and the attorney cannot recover." (P. R. p. 316). The court also gave other instructions favorable to the defendants. (P. R. pp. 317, 318, 319 & 320).

The evidence clearly showed that Tuppela was sane from December 17, 1917, to June, 1921 (P. R. pp. 66, 193, 194, 202, 203, 219, 259—262, 273,337), and the court so instructed the jury (P. R. p. 319).

We submit that not only was the plaintiff not guilty of any negligence, but furthermore, even if he had been, that it was incumbent upon the defendants to show that such negligence had caused Tuppela to suffer damages before he could maintain a defense thereon.

> "To entitle himself to this defense, the client must show that he suffered damages consequent upon the attorney's negligence."
>
> 2 R. C. L. 1013, 1025;
>
> Bank v. Ward, 100 U. S. 195,
> 25 Law Ed. 621, 622.

The case of Thorn v. Beard, 32 N. E. 140, is entirely inapplicable. The evidence clearly shows that the plaintiff advised Tuppela as to "What was best to be done in the matter" (P.

R. p. 64), and to locate his witnesses and papers and "that he should not enter into any negotations with the Chichagoff Mining people or wiht Mills until he had consulted with me, and to sign no papers, as I believed they would naturally want to get in touch with him and want him to assign his rights in the property for a nominal sum." (P. R. p. 83), and Tuppela's affidavit, sworn to before the defendant Cobb on September 12, 1919, is plainly indicative of the fact that he, Tuppela, acted on the plaintiff's advice in refusing to acecpt the proceeds of the sale and sign a paper after he, Tuppela, reached Sitka in the fall of 1918. (P. R. p. 360).

Fifth.

The fifth proposition advanced by the defendants is that "plaintiff's remedy was a suit on quantum meruit for the value of the services rendered, and not for damages on the contract." (Br. of Plaintiffs in Error, p. 13).

We have no doubt of the power of a client to terminate the authority of his attorney, but we submit that this concession does not affect the rule that if a client does so and thereby breaches his contract with the attorney, he must respond for the breach, and that the power of a client to so terminate a contract with his attorney must be distinguished from his righ t to do so. We do not understand that there is any rule of law that goes to the extent of holding that a client may violate his contract

with his attorney and not be answerable therefor.

The facts in the Washington case of Ramey v. Graves, 191 Pac. 801, appears to us to be easily distinguishable from the facts in this case, as well as not in accord with the weight of authority. That case, if we correctly understand it, was contingent on the **successful prosecution of a suit**, and furthermore the successful action appears to have been actually prosecuted in the name of a third party, i. e., the maternal grandfather. The contract between Tuppela and the plaintiff was not necessarily dependent upon an actual suit (P. R. pp. 334 & 336).

In the case of Western Telegraph Co. v. Summers, 20 Atl. 129, there was nothing in the contract which interfered with the client's unlimited control over the litigation, and the controversy was compromised, so it was impossible to say whether or not the outcome of a suit would have been successful. In this case the suit was brought was successful, and we submit that under the law the presumption is that the suit would likewise have been successful if prosecuted by plaintiff as attorney.

In the case of Harris v. Root, 72 Pac. 429, there was a mutual abandonment of the contract, and the controversy was compromised and it was impossible to tell whether or not there would have been a successful conclusion if the suit had been prosecuted.

The weight of authority is that if a client discharges the attorney employed under a contract, such as the contract between Tuppela and the plaintiff, before that contract has been comleted, such discharge is a breach of the contract.

Brodie v. Watkins, 33 Ark. 545, Am. Rep. 49;

Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060;

Shevalier v. Doyle, 130 N. W. (Neb.) 417;

Dorshimer v. Herndon, 153 N. W. (Neb.) 496; 154 N. W. 207;

Scheinesohn v. Lemonek, 84 Ohio State 425, 95 N. E. 913.

The Supreme Court of Iowa has had occasion to express our contention in the following succinct language, to-wit:

> "No contract of employment can prevent a client from dismissing one attorney and entering into a new arrangement with another. Such conduct may subject the client to liability to the attorney for damages for breach of contract, but cannot prevent his discharge and the consequent conversion of his claim into one of damages for breach of contract, instead of one for services rendered under an existing contract."

Crosby v. Hatch, 155 Iowa 312, 316;
135 N. W. 1079;
2 R. C. L. 1048.

There seem to be three remedies open to the attorney under such circumstances, to-wit: (a) he may acquiesce in the breach and sue on a quantum meruit for the value of his services to the date thereof, or (b) he may wait until the end of the term, then sue for the agreed compensation, or (c) he may sue at once for damages.

In the Indiana case of French v. Cunningham, 49 N. E. 797, which case is cited by defendants, that court, at page 799 said:

> "But whatever may be the rule as to other contracts, the rule as to contracts employing attorneys is as we have shown that if the same is broken by the client the attorney may recover on quantum meruit for the reasonable value of his services, or he may sue upon the contract, and recover damages for its breach."

French v. Cunningham, 49 N. E. 799.

The court instructed the jury that the measure of damages was the amount of money that the plaintiff would have received had he been allowed to complete the terms of his contract, less the value of such services as would have been required to complete the contract and less such expenses as he would have been

compelled to incur in carrying out the contract (P. R. pp. 312 & 313).

We submit that these instruction were extremely favorable to the defendants, and that in fact they were more favorable than the defendants were entitled to under the law as they in effect permitted the jury to make deductions in mitigation of plaintiff's damages although there appears to have been neither pleading nor proof of such mitigation. It is a general rule of law that mitigation of damages under such circumstances must be pleaded and proved by the employer (Notes, pp. 107, 108 & 109, 6 L. R. A., N. S.). The instructions thus confined the damages to compensation for the actual work which the plaintiff performed, and thereby gave effect to the rule which defendants are contending for, i. e., that plaintiff was only entitled to compensation for the services rendered.

We submit that these instructions could be bona fidedly complained of only by the plaintiff and that under the rule announced by this court in Kikuchi v. Ritchie, 202 Fed. 857, the learned trial court would have been warranted in having given instruction much more favorable to the plaintiff and much less favorable to the defendants than the instructions actually given, and that the defendants under the instructions given received the benefit of mitigated damages which in fact they were not entitled to receive.

But regardless of any similarity or lack of similarity between the facts of this case and the facts of the cases cited by defendants, under the contract between plaintiff and Tuppela the real measure of damages was the agreed compensation, i. e., one-half of the amount recovered by Tuppela, which in this case must be admittedly at least one-half of $300,000. It seems to us therefore that the defendants have little cause to complain of an instruction that permitted the damages to be measured, after deductions had been made, upon the actual services rendered instead of upon the actual agreed compensation in accordance with the correct rule as announced in:

Kikuchi v. Ritchie, 202, Fed. 857;

Moyer v. Cantieny, 42 N. W. 1060;

Barcus v. Gates, 130 Fed. 364, 369;
136 Fed. 184;

Carter v. Baldwin, 95 Cal. 475;
30 Pac. 595;

McBowan v. Parrish, 237 U. S. 285.
59 Law Ed. 956,
964;

Detroit v. Whittemore, 27 Mich. 281;

Scheinesohn v. Lemonek, 95 N. E. 913, Am. Cases 1902 C737;

Webb v. Trescony, 76 Pac. 621,
18 Pac. 796;

Dorshimer v. Herndon, 153 N. W. (Neb.) 496,
154 N. W. (Neb.) 207.

and that the defendants were benefited and not injured by the instructions of which they complain.

Conclusion.

In conclusion we submit that the judgment of the trial court should be sustained as to both the second and third causes of action for the reason:

1st: That the defendant Cobb is not only a proper but a necessary party to the action, and, even were it otherwise, which we do not concede, defendants' objections thereto came too late and could not affect the validity of the judgment against his codefendants, and that justice would not be subserved by requiring plaintiff to bring a separate action against him to pay the judgment against the defendant Tuppela.

2nd: That both the law and the evidence amply supports the judgment, and that the learned trial court committed no error to the prejudice of the defendants.

3rd: That there is no error whatsoever as-

signed to secure a reversal as to the third cause of action.

Respectfully submitted,

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